

Turning Swift Policy-making into Deadlock and Delay: national policy coordination and the transposition of EU directives

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Turning Swift Policy-making into Deadlock and Delay

National Policy Coordination and the Transposition of EU Directives



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ABSTRACT

Most member states of the European Union (EU) have some difficulty in transposing EU directives. Despite the obligation to comply with EU law, member states are often slow to adopt national policies implementing directives. In this paper I analyse this problem by focusing on the coordination of transposition in the domestic policy arena. Coordination is approached as a game in which one or more higher-level players decide on policy when lower-level players are unable to make a decision. Based on the model developed in the paper, lower-level players sometimes appear to have discretion in shaping the policy transposing a directive. Furthermore, if a single player coordinates the transposition process, the implementing policy differs from the policy specified by the directive. However, a decision-making process with more than one higher-level player can result in deadlock, leading to a literal transposition of a directive. Moreover, deadlock between the deciding players may delay the transposition process. Both mechanisms are illustrated by two cases of decision-making on EU directives in The Netherlands: the cocoa and chocolate products directive and the laying hens directive. The analysis shows that the framework developed in this paper contributes to the understanding of transposition.

KEY WORDS

- domestic players
- EU policy process
- national policy
coordination
- transposition

Introduction

When the European Union (EU) adopts a new directive, this directive needs to be transposed into national law before it can be implemented. Without proper transposition, a directive is not integrated into the national legal system, creating the risk that the policy specified is partly or incorrectly implemented. Despite their obligation to comply with EC law, most EU member states appear to have some difficulty in transposing directives.¹ Even though the Stockholm European Council (2001) stressed the importance of full transposition and agreed that all member states have to reduce their transposition backlogs to less than 1.5% of the total number of directives in 2002, most member states, including the largest ones, have not yet met this target.² Furthermore, using a sample of directives to be transposed by The Netherlands, Mastenbroek (2003: 384) found that transposition was delayed for 42% of the directives, with an average delay of about one year (in one case, the delay was more than six years after the agreed deadline). More recent work indicates that delays in transposition seem to be widespread among the member states (Berglund et al., 2005; Kaeding, 2005; König et al., 2005).

Why do member states sometimes have difficulty in adopting EU policy that has already been agreed on? This paper answers this question by focusing on the issue of transposition in relation to national policy coordination. A number of studies have tried to explain why member states differ in their transposition success. A recent large-scale study by Falkner et al. (2004, 2005) identifies 'different worlds of compliance' rooted in the cultural and political characteristics of the member states as the main cause of delays in transposition. Another approach was developed by Siedentopf and Ziller (1988), and later by Pappas (1995), which stresses the importance of administrative capacity and national coordination for compliance. Other authors have argued that problems with transposition are the result of a 'misfit' between the directive and the existing policy (Héritier, 1995; Duina, 1997; Börzel, 2000) or domestic administrative institutions (Knill, 1998; Knill and Lenschow, 1998). This 'misfit' requires adaptation in the domestic area, which leads to delay or misapplication of community law. A more actor-oriented perspective develops arguments about the role of domestic opposition in the implementation of the directive, and especially different views among the decisive domestic actors about the preferred regulatory regime. This opposition may arise from different visions that domestic actors have on how to reform their domestic policy (Héritier et al., 2001) or different preferences by veto players (Haverland, 1999, 2000; Dimitrova and Steunenberg, 2000). Delays, according to this line of argument, reflect the domestic opposition to the implementation of the directive. Furthermore, differences in domestic interests may lead

to 'legislative' or 'bureaucratic' drift, since lower-level policy actors may deviate from the policy specified in the directive.

In this paper I follow this line of research and use an actor-oriented approach to transposition. An important question that arises is who the relevant domestic players are. The answer to this question depends on the national legal system and the extent to which this system gives policy-making power to different political and administrative actors, either through constitutional provisions or through existing legislative delegation. Consequently, decision-making on transposition is not uniformly organized in all member states and for all directives but consists of processes at different levels in which various actors play a role. This diversity is illustrated by some recent findings on transposition. In Spain, for example, for only 11% of the directives currently in force, the government passed a law through the national parliament in order to comply with the directive's requirements (Steunenberg and Voermans, 2005: 132). More than 80% of the directives were transposed through either government decrees (40%) or ministerial orders (42%). For The Netherlands, similar proportions are reported by Bovens and Yesilkagit (2005). Finally, in Austria, the federal government transposed 41% of EU directives through federal law and 59% through government decrees in the period 1995–2003 (Jenny and Müller, 2005). Although this percentage is lower than in The Netherlands and Spain, again most of the directives were transposed through lower-level legal instruments. Often, the relevant players are not actors within the member state's legislative process but administrative players who implement directives through lower-level legal instruments.

These relevant players have their own views on how an EU directive should be implemented. Given their different preferences, it is the policy coordination mechanism that will determine the impact domestic players have on transposition (see also Kassim et al., 2000). Therefore, I focus on coordination, which is modelled as a game with two distinct levels: at one level, players have to propose how to transpose a directive; at another and hierarchically higher level, players decide when lower-level players have failed to agree. In this way, decision-making is conceptualized as a multi-level process in which the higher-level players resolve potential conflict between the lower-level players. The framework used in this paper builds on Dimitrova and Steunenberg (2000), who model transposition as a decision by the government taking account of the preferences of (at least) two domestic political groups. However, here the assumption that transposition is the outcome of legislative decision-making is dropped. Transposition is modelled as a two-level game in which lower-level players try to transpose a directive first before higher-level players make a move. A related study by Franchino (2005) models the decision to delegate policy-making to the member states at

the EU level. Even though he also includes an executive stage in EU policy-making, the approach taken here differs from this study in several important aspects. Whereas Franchino assumes that national administrations have the same preferences as national governments, I include the possibility of different preferences between these groups of actors. Furthermore, his model seeks to determine the discretion offered by a directive, whereas this paper aims to understand the domestic response to a directive.

The paper is structured as follows. I first develop an analytical framework to analyse national decision-making and the way in which coordination helps to resolve disagreement among the various players. The analytical framework is then applied to two cases of decision-making on EU directives in The Netherlands, which confront the basic logic of the approach with empirical data. The focus on The Netherlands is useful because this country, like several other EU member states, has cases of transposition with multiple coordinating players as well as cases in which only one (administrative) player coordinates transposition. However, based on the policy-specific approach taken in this paper, any context could be used to explain transposition as long as the key factors are identified.

The use of case studies is particularly helpful in this context owing to the fact that the derived hypotheses require detailed information such as the identification of players, the main political issue at stake, the preferences of players, the contents of the policy specified in the directive and the range of legally feasible policy options (for a further discussion see Pahre, 2005). The cases selected cover both single-player (cocoa and chocolate products directive) and multi-player coordination (laying hens directive). The relevant players in each case, together with their preferences, were established in interviews in which the experts were asked to identify the main issues, the players involved and the positions of these players.³ Official publications, including the proceedings of the Dutch parliament, have been used in order to validate the judgements of the interviewed officials. In concluding this paper, I discuss how national policy coordination contributes to our understanding of transposition in the broader discussion of compliance in the EU literature.

Transposition as a problem of domestic coordination: Towards a model

Transposition is by no means a mechanical process. A directive is the starting point for drafting a national implementing measure, but it usually requires additional interpretation. The extent to which this is necessary depends on the contents of the directive. A directive may provide for certain different

options or leave open how specific targets have to be achieved. In addition, it may contain ambiguous provisions resulting from intergovernmental bargaining at the EU level. Franchino (2004: 286–91) studied the various degrees of specificity of directives and found that directives sometimes provide member states with substantial discretion, especially when implementation requires specialized and technical knowledge.

This discretion allows member states to choose from a range of policies that could be implemented domestically. Following Dimitrova and Steunenbergh (2000: 216), these policies are called *sustainable* policies. However, if a domestic policy outside the range of sustainable policies is selected, the Commission will challenge the member state for not transposing or for incorrectly transposing a directive into national law.⁴

Depending on the national legal system, directives are transposed in different ways, including statutory law, government decrees and ministerial orders (for an overview, see Asser Instituut 2004: 24–5; Steunenbergh and Voermans, 2005). Naturally, a statutory law or act needs to be approved by parliament. Sometimes parliament adopts a general authorization law that allows the government to transpose all directives (for example, the European Communities Act in the UK) or a list of directives (for instance, the *lois d'habilitation* in France). In this context, often a 'call back' procedure is used in which parliament has to approve the adopted measure, by either explicit or implicit approval. Other member states, such as Denmark, Germany and The Netherlands, employ specific delegation clauses, which give non-parliamentary actors the authority to adopt implementing measures in some policy area. These measures, which include government decrees and ministerial orders, are typically prepared by administrative actors within national ministries or implementing agencies. Parliamentary acts regulating the delegation to these actors are often general or cover a large part of a policy area (Steunenbergh and Voermans, 2005: 43–5). They provide administrative actors with substantial power, sometimes including the possibility to transpose any directive in a field, long before a directive is passed. Therefore, at the stage of transposition, governments have limited choice over the procedure to be applied.

The variations in decision-making procedure indicate that different players can be involved in transposition processes. In this paper, I therefore use the notion of policy-specific players who formally or informally have the authority to affect the outcome of decision-making: they may have the right to draft a proposal (agenda-setting power), or they may need to support a proposal individually or collectively (veto power) (Tsebelis, 1995; Steunenbergh, 1996: 314–16). Players are not restricted to 'formal' players in the national legislative process (Tsebelis, 2002: 19) but include those with

informal power as well. This notion of players relates to the concept of 'factual veto points', as developed by H  ritier (2001: 12), which refers to players with *de facto* decision-making power.

Emphasizing the importance of coordination – by either political or administrative players – I approach transposition as a process taking place at two distinct levels, each with different players: lower-level and higher-level (or coordinating) players. The lower-level players try to decide on a measure transposing a directive. These players could be civil servants in the ministerial units preparing a ministerial order or ministers drafting a statutory law. The higher-level players become involved when the lower-level players have not been able to reach agreement on how to transpose a directive or on certain issues of it. Depending on the procedure used, these players can be different ministries overseeing the transposition process, different administrative bodies involved in the transposition process, cabinet ministers who share responsibility for the policy area involved, or different coalition parties in parliament that need to support the adoption of transposing legislation.

Looking at the two-level structure in the decision-making process, the question arises of why higher-level players do not make decisions themselves and avoid delegation. However, deviations from the most preferred policy do not necessarily imply that higher-level players prefer to make these decisions themselves (Horn, 1995; Epstein and O'Halloran, 1999). First, higher-level players delegate decision-making because they do not have the time, capacity and expertise to make policies on a large number of different issues. Refusing to delegate and holding on to their power inevitably leads to ineffective policies with outcomes that are politically harmful or to no policy at all. Clearly, avoiding such outcomes provides the motivation for higher-level players to involve lower-level players in the policy process. Second, in the context of statutory law, delegation is best understood as providing the administration with policy-making power for a broad range of issues. It underscores that higher-level players are not very interested in each and every detail of a policy and prefer to make a 'go' or 'no-go' decision with regard to the final proposal. Without going any deeper into the reasons for delegation, I will discuss now how existing coordination mechanisms affect transposition.

All players are assumed to have single-peaked, spatial preferences over outcomes in terms of domestic policy. These preferences imply that each player prefers a specific and unique policy. The position equating to this policy is called a player's ideal point. Moreover, the further away an alternative policy is from this ideal point, the less it is preferred. The ideal point is labelled L_i for a lower-level player, $i \in \{1, 2, \dots, n\}$ and H_i for a higher-level player, $i \in \{1, 2, \dots, m\}$. Furthermore, I assume that at each level one of the players (the agenda-setter) has the authority to put a proposal to the other

players, who decide whether to accept or to reject the proposal. The need to reach an agreement on the implementing instrument is represented in terms of veto power for each of the participating players: only if both actors accept the proposal, and thus refrain from using their veto power, is a policy adopted.

The game is structured as follows. The lower-level player with agenda-setting power proposes an implementing measure to the other lower-level players. These players decide whether to accept or to reject the proposal. If all lower-level players accept the proposal, a policy is adopted. Given such agreement, the higher-level players need only to approve the policy. However, if the lower-level players do not agree, the higher-level agenda-setter puts a proposal to the other higher-level players, who then decide whether to accept or to reject the proposal. Finally, the European Commission decides whether to challenge the implementing measure by starting an infringement procedure. I assume that the domestic players prefer to avoid being challenged by the Commission since they would lose face domestically as well as internationally.

The various stages of the game are illustrated in Figure 1. Following this sequence of play, and assuming that players have complete and perfect information, the concept of sub-game perfectness can be used to identify the equilibrium, which depends on the set of sustainable policies and the specific players' preferences.

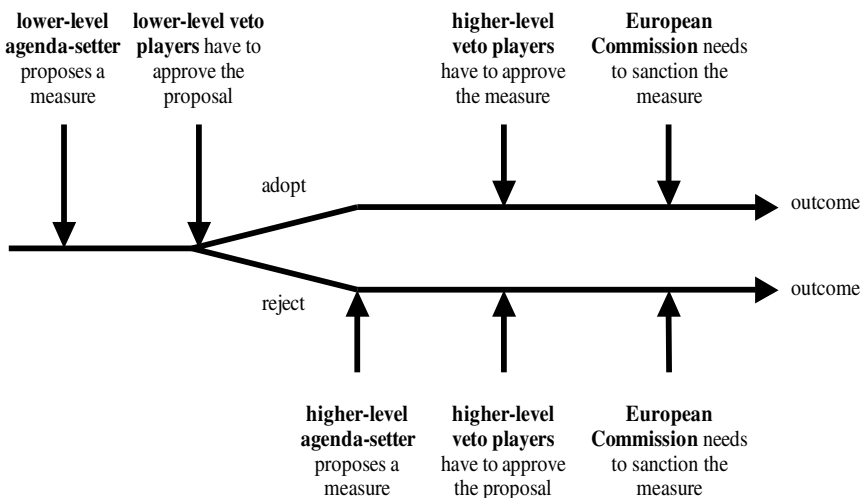


Figure 1 Domestic transposition: The sequence of moves.

The power of the higher-level player

How will the domestic players transpose the directive? If lower-level players have to decide on an implementing policy, the first issue is whether sustainable policies exist, that is, policies that will be permitted by the Commission. As illustrated in Figure 2, all points between \underline{d} and \bar{d} are sustainable policies (and form the set of sustainable policies D), which include the policy specified by directive d . Furthermore, sustainable policies are not necessarily symmetrically distributed around d . The directive may suggest a minimum level of regulation (as in the case of the laying hens directive), or the wording in the directive may be interpreted in only one way. Consequently, the distances between d and its minimum and maximum values may vary.

The second issue is whether both lower-level players prefer some alternative to the point of reference, that is, the policy proposed by the higher-level players. I start with a model with only *one* higher-level player and relax this assumption later. If the higher-level player is not constrained in making a choice, as in Figure 2(a), this player will set the policy equivalent to his or her ideal position as the implementing policy, that is $p = H_1$. This policy is part of the set of sustainable policies and will not be challenged by the European Commission. Furthermore, this policy is the higher-level player's best choice from the set of policies this player prefers to the directive d . This set, which I will call the higher-level player's *set of preferred policies*, includes all policies between directive d and the player's point of indifference $h_1(d)$.

The higher-level player's choice for the implementing policy of $p = H_1$ renders it difficult for the lower-level players to select an alternative.⁵ Lower-level players are able to make a proposal only if policies exist that are jointly preferred to the higher-level player's preferred policy. This is the case if the individual preference sets of the lower-level players overlap. For the configuration in Figure 2(a), those sets do *not* overlap since p is found *between* both players. Whereas player 1 wants a change to the left of p , player 2 prefers a change to the right. This configuration makes lower-level decision-making impossible.

A similar problem arises for the configuration presented in Figure 2(b), in which all players prefer a policy that is substantially different from the directive. Being constrained by the set of sustainable policies, the higher-level player's best choice is policy $p = \bar{d}$, which is both a *sustainable* and a *preferred* policy. Furthermore, the lower-level players prefer some alternatives to p . These alternatives are found in the lower-level players' *set of preferred proposals*, which are equal to the interval between p and $1(p)$ in Figure 2(b). Since veto player 1 wants a smaller deviation from policy p than veto player 2 does, player 1's individual preference set is more restrictive and thus determines the

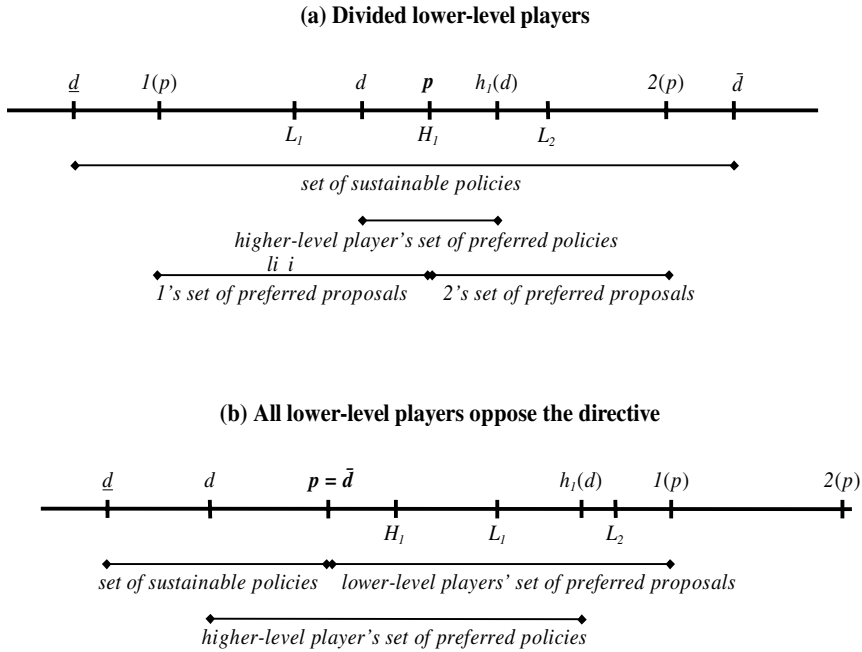


Figure 2 The power of the coordinator.

elements of this set. Although preferred proposals exist, these policies do not overlap with the set of sustainable policies. Consequently, no policies exist that are *both* sustainable and preferred by the lower-level players. Again, lower-level decision-making is impossible and the higher-level player decides.

The analysis indicates that the higher-level player decides the implementing policy if the lower-level players are divided over this policy (*condition 1*) or if they cannot draft a preferred proposal that is also a sustainable policy (*condition 2*). The higher-level player also decides the implementing policy if the directive equals his or her ideal point (*condition 3*). In these instances, the lower-level players do not affect the implementing policy. Using these conditions, the following expectation can be formulated with regard to the power of the higher-level player: *under each of three conditions mentioned, the higher-level player selects an implementing policy closest to his or her most preferred position* (Hypothesis 1). Although I have used only one player, a similar result holds for cases with more than one higher-level player. In that case, condition 3 has to be substituted by the necessary condition that the directive should not divide the higher-level players (see Propositions 1' and 1A in the Appendix).

If these conditions are not present, other outcomes occur. These are discussed in the following section.

Discretion to lower-level players

Although coordination may lead to a policy implemented by the higher-level player, this outcome is not common. If policies exist that are *sustainable*, *preferred by the higher-level player* and *preferred by all lower-level players*, the lower-level players will transpose a directive. These policies are called *feasible policies* because they satisfy each of these three conditions. In the preference configuration presented in Figure 3, feasible policies are found between d and H_1 .

If feasible policies are available to the lower-level players, the question is which policy will be made. For the moment, I assume that player 1 is the agenda-setter, and player 2 has the possibility of rejecting the proposal. Making his or her best choice, player 1 chooses interpretation d , which is accepted by player 2, approved by the coordinator and not challenged by the Commission. This outcome is a literal interpretation of the directive. A different outcome is found if player 2 and not player 1 is the agenda-setter: this player would propose interpretation L_2 . The directive is now transposed in a non-literal way through a domestic policy equal to player 2's most preferred position.

Generally, lower-level players often adopt the policy that transposes a directive. This occurs if the lower-level players prefer an implementing policy that differs from the one preferred by the higher-level player (negation of condition 1) and can draft a preferred proposal that is also sustainable (negation of condition 2), while the directive does not equal the higher-player's most preferred position (negation of condition 3). Using these new, necessary conditions, I define decision-making situations in which the lower-level players have discretion. The degree of discretion depends on the size of the set of feasible policies. With regard to the outcome, as indicated by Proposition 2 in the Appendix, the following expectation can be formulated: *under*

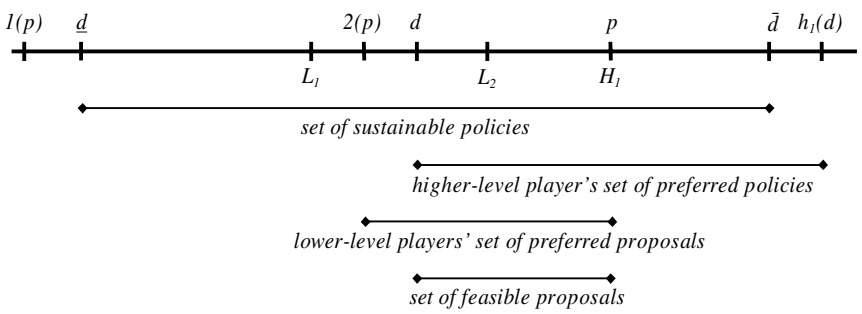


Figure 3 Lower-level discretion.

the three conditions mentioned, the lower-level players transpose a directive and adopt an implementing policy closest to the most preferred position of the lower-level agenda-setter (Hypothesis 2).

Multi-player coordination

Another mechanism is *multi-player coordination*, which has more than one higher-level player. Here, I will use an example with two higher-level players, H_1 and H_2 . The Appendix presents a result for every possible number of players. Since multi-player coordination is the more general case of single-player coordination, it includes results similar to Hypotheses 1 and 2, which I will not discuss further (see the Appendix for details). However, multi-player coordination also allows a third outcome, which was not possible under single-player coordination. This possibility is based on preference configurations such as the one presented in Figure 4.

In Figure 4 the higher-level players are divided over the issue of how to transpose the directive. Whereas player 1 prefers a change to the left, player 2 wants a change to the right. Although sustainable policies exist, the domestic players disagree on transposition and are unable to make a decision to deviate from d . This creates a situation of deadlock in which the higher-level players initially are unable to decide on a domestic policy and eventually agree on a literal transposition of d (see Proposition 1B in the Appendix).

This result, which is typical for multi-player coordination, leads to the expectation that *if higher-level players are divided on a directive, the directive is transposed in a literal way* (Hypothesis 3). It specifies a proposition by Dimitrova and Steunenberg (2000: 215–16, 222), who suggest that any division between players leads to a literal transposition. However, the model proposed in this paper indicates that this outcome is typical for multi-player coordination: it mainly occurs if higher-level players have to make a decision and are divided. A difference in views between the lower-level players does not necessarily lead to this outcome since a decision is made by the higher-level players in this case.

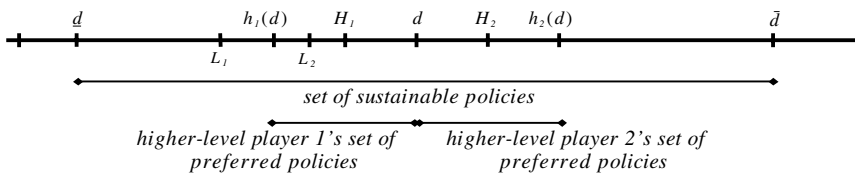


Figure 4 Deadlock.

Literal transposition as a result of deadlock can be associated with delay in the transposition process. Because the higher-level players prefer changes in opposite directions, they may hinder swift decision-making. Some players may postpone their decision to the very last moment, whereas others may try to resolve the existing deadlock by redefining the issues at stake, adding new issues, linking the issues with other decision-making processes, or trying to change the preferences of the opponents (Héritier, 1999: 16–17). In the end, and if these attempts are not successful (which would otherwise change the decision-making situation), opposing preferences lead to a literal transposition. This process suggests an additional expectation: *if higher-level players are divided, transposition is delayed* (Hypothesis 4).

Having discussed the main features of both coordination mechanisms, I now turn to two empirical cases of transposition in which these mechanisms play a role. Although in both cases domestic players were divided on how to transpose certain aspects of the directive, the processes and outcomes of transposition were rather different.

Cocoa and chocolate products directive

The first case concerns a directive on cocoa and chocolate products adopted by the Council and the European Parliament on 23 June 2000 (European Parliament and Council, 2000). The goal of this directive is to create common rules for the composition, specification, packaging and labelling of cocoa and chocolate products. One of the main issues was whether chocolate may contain other natural vegetable fats (Bailer and Schneider, 2006). The use of vegetable fat was heavily contested because the chocolate industry in the member states followed different traditions. Producers in the UK and Ireland had been using vegetable fats other than cocoa in the production of chocolate. Chocolate producers in Belgium, France, Luxembourg and The Netherlands did not use these ingredients. Fearing competition from the larger manufacturers in the UK, these countries opposed the use of fats other than cocoa. After years of preparation, the European Commission released its proposal to change the ingredients of chocolate in April 1996 (European Commission, 1996). Despite the opposition of The Netherlands, which voted against the common position in the Internal Market Council of 28 October 1999, the directive was adopted one year later. Since August 2003, chocolate in the EU may contain natural vegetable fats up to an amount of 5% of its total weight. Furthermore, the sales names of chocolate were harmonized and strictly regulated by the new directive.

The chocolate directive was transposed in The Netherlands using two government decrees, as illustrated in Figure 5. Both decrees were based on

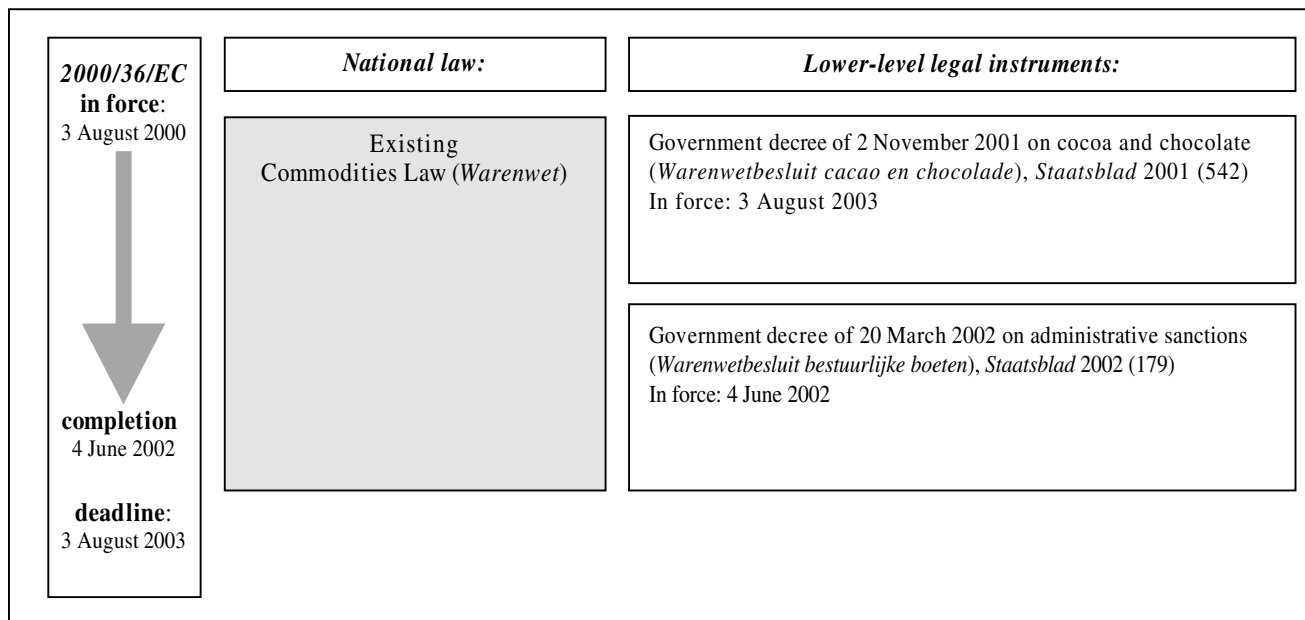


Figure 5 Transposition of the cocoa and chocolate products directive in the Netherlands.

the existing Commodities Law, which provides the Minister of Health, Welfare and Sport with the authority to propose decrees on food safety, which have to be approved by the cabinet. In making a decree, the minister, who is an independent agent within the Dutch context, has the lead and is politically responsible for the adoption of the proposal. The minister is therefore *de facto* the deciding player. Transposition was completed in June 2002 with the adoption of the second decree. Despite strong opposition in the preparatory process, the transposition process was finalized more than a year before the deadline.

The relevant players were the ministries involved in the procedure of changing the decrees based on the Commodities Law. The Ministry of Health, Welfare and Sport had the lead, and consulted the Ministry of Agriculture, Nature and Food Quality and the Ministry of Economic Affairs.⁶ The Directorate on Food and Health Protection of the Ministry of Health prepared the decree and can therefore be regarded as the lower-level agenda-setter. The Ministries of Agriculture and Economic Affairs are the other lower-level players. Being politically responsible for the making of the decree, the Minister of Health is the only higher-level player. This setting makes the transposition of the cocoa and chocolate products directive an example of single-player coordination as presented earlier.

The relevant domestic players did not take a strong stand on the use of other vegetable fats and were more interested in how strict the rules would be on the sales names, definitions and characteristics of chocolate products. The Ministry of Health was concerned about food safety and whether the packaging of chocolate products would provide sufficient information about ingredients to consumers. Economic Affairs and Agriculture aimed at establishing a level playing field for chocolate products in the Union. Economic Affairs in particular had a strong preference for having uniform rules regarding chocolate products. This meant that both Economic Affairs and Health preferred clear and unambiguous rules on the sales names, definitions and ingredients of chocolate products. The Ministry of Agriculture, however, held a less pronounced view on this since it was concerned with the position of the industry, which was divided over the directive. The positions of the domestic players in the transposition process are illustrated in Figure 6.

The directive explicitly prohibited additional national regulations that could hinder the free circulation of chocolate products under the sales names mentioned in the directive. Article 4 of the directive states that, for these chocolate products, 'Member States shall not adopt national provisions not provided for by this Directive'. This prohibition, as well as the exact wording used in the text, limits the possibilities for member states to reinterpret some of the directive's provisions. Consequently, the set of sustainable policies is

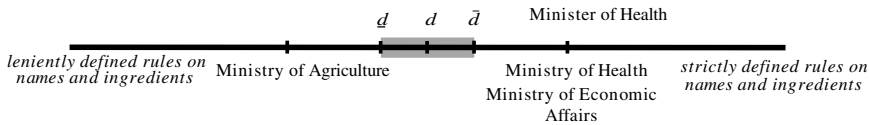


Figure 6 Preferences of the domestic players on the cocoa and chocolate products directive.

narrowly defined. This set is indicated by the grey area in Figure 6, where d represents the contents of the directive.

Because the lower-level players – the departments within the Ministries of Economic Affairs, Agriculture and Health – were divided over the implementing policy, the configuration presented in Figure 6 corresponds to the situation described by Hypothesis 1. This hypothesis predicts that the lower-level players would accept the policy proposed by the higher-level player, which is the Minister of Health. The Minister's best policy choice, $p = \bar{d}$, which is located at the upper boundary of the set of sustainable policies, is the expected outcome. This theoretical outcome, which slightly deviates from the literal content of the directive, is confirmed by the empirical outcome. The government decree actually deviated from the original text of the directive on some issues concerning sales names and labelling of chocolate.

During the transposition process the Ministry of Health noted that some product descriptions in the directive were not mutually exclusive, which would allow some products to be labelled in two different ways. This applied to, for example, the definitions of *milk chocolate* and *family milk chocolate* in the annex of the directive, which used overlapping percentages of cocoa solids. The ministry differentiated between these two products by also defining the maximum amount of dry cocoa solids in family milk chocolate (see Article 13 of the government decree on cocoa and chocolate). In addition, the ministry observed that Article 3 of the directive did not clearly indicate how to determine the percentage of total dry cocoa solids to be presented on the label of chocolate products. After consulting the Commission, and in accordance with an opinion of the Standing Committee on Foodstuffs, the percentage was interpreted as the amount of cocoa solids in the chocolate content of a finished product (Minister of Health, 2001: 10).

These adaptations in the implementing measure indicate that the transposition of the directive was not carried out in a literal way but took some of the concerns of the higher-level player into account. This observation is in line with the framework developed in this paper. In addition, the transposition of this directive was not delayed and was finished more than a year before the actual deadline. It shows that strong opposition against the directive during the legislative process, which was fuelled by the Ministry of

Foreign Affairs, did not preclude the Ministry of Health from transposing the directive on time. The issues that played a role during transposition differed from the ones that played a role during the EU legislative process. Once the decision was taken to allow vegetable fats in chocolate other than cocoa, the Ministry of Foreign Affairs lost interest and did not participate in the domestic decision-making process, and the interventions by other players focused on sales names and the labelling of chocolate products.

Laying hens directive

The second case discussed here is a directive on the protection of laying hens, which was adopted by the Council on 19 July 1999 (Council of the European Union, 1999). The goal of this directive was to provide minimum standards for the keeping of laying hens, especially with regard to the use of cage systems. The directive introduced new and higher minimum standards for cage systems, including more space, a separate space or 'nest', perches, and litter to allow for pecking and scratching. Systems satisfying these standards are called 'enriched' battery cages. The directive also set higher requirements in terms of space in existing battery cages. Moreover, the so-called 'unenriched' battery cage systems could no longer be brought into service after 1 January 2003 and will be prohibited from 1 January 2012 onwards.

The Minister of Agriculture, Nature Management and Fisheries, Laurens Jan Brinkhorst (D66), aimed to transpose the directive by government decree (see Figure 7). The existing Health and Welfare Law for Animals provides the minister with the *conditional* authority to decide on the issues related to the welfare of animals, including how they are kept. A proposed measure has to be presented to parliament and, if parliament does not respond within one month, the measure comes into force. This call-back procedure differs from the procedure used for transposing the cocoa and chocolate products directive, in which the Minister of Health had unconditional decision-making authority.

In the case at hand, parliament responded by indicating that it preferred the rules transposing the directive to be introduced by law. Owing to the unexpected fall of the second Kok cabinet in April 2002, this dossier was taken over by the new State Secretary of Agriculture, Nature Management and Fisheries, Berend Jan Odink, who was a member of the List Pim Fortuyn (LPF) in the first Balkenende cabinet. Disagreement within the LPF led to the fall of that government in October 2002 and new elections in January 2003. Although the State Secretary at first preferred to amend the initial decree on the keeping of laying hens (Minister of Agriculture, 2002), he decided to

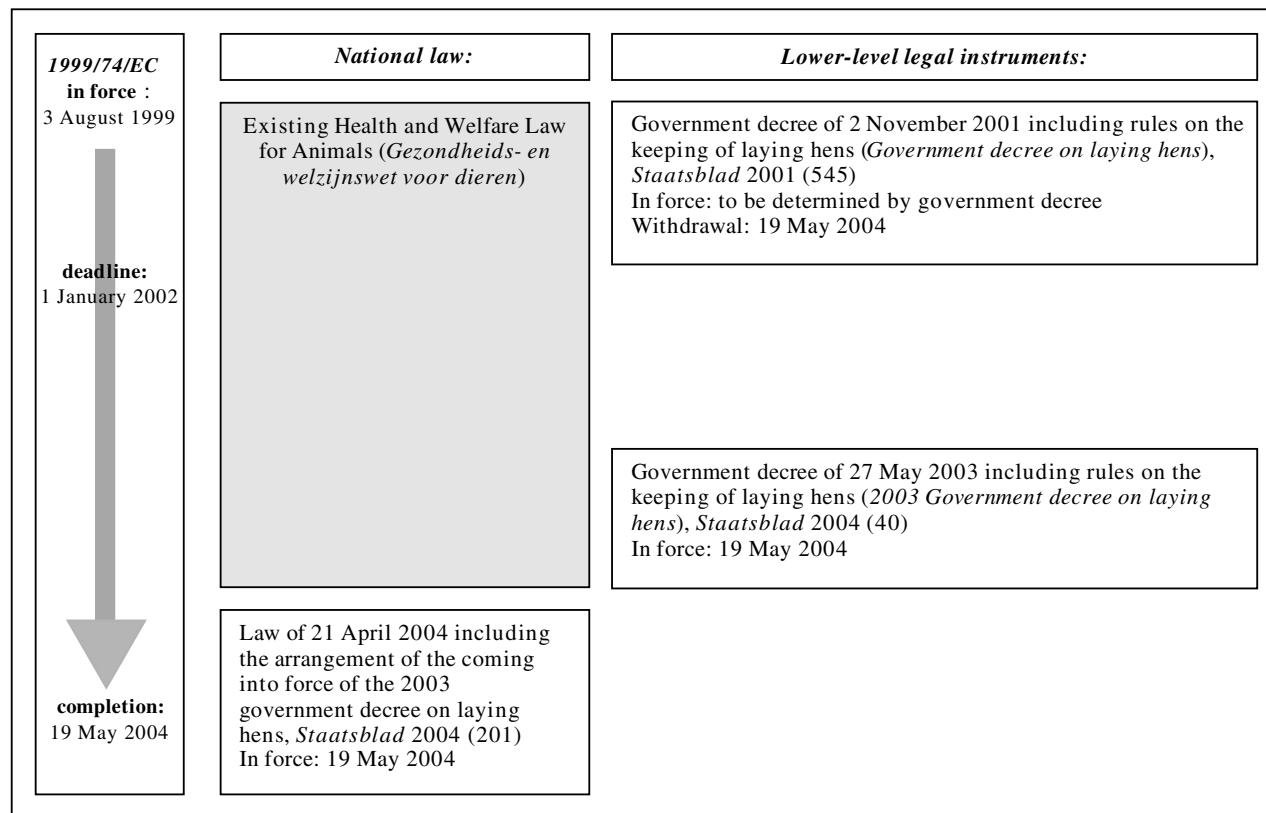


Figure 7 Transposition of the laying hens directive in the Netherlands.

withdraw his predecessor's proposal and make a new decree, which was adopted in May 2003 (see Figure 7). Again, parliament used its authority to require that the government introduces these rules by law. The Minister of Agriculture, Nature and Food Quality in the second Balkenende cabinet, Piet Veerman (CDA), who served in the same post in the previous cabinet, discussed the proposal with parliament. The law adopting the second decree on the keeping of laying hens was eventually approved by parliament on 31 March 2004. It came into force on 19 May 2004, more than two years after the deadline.

The relevant players were, first of all, two departments within the Ministry of Agriculture: the Department of Legal Affairs, which was responsible for transposing the directive, and the Policy Department, which prepared the Dutch position during the preparation of the directive and was involved in the negotiations at the EU level (the Department of Animal Production and Welfare in the Directorate of Agriculture of the Ministry). The Minister of Agriculture can be regarded as the agenda-setting player among the lower-level players. The higher-level players were primarily the political parties supporting the government. Based on the three cabinets that dealt with the laying hens directive, these parties included the Labour party (PvdA), the Liberals (VVD) and D66 in the second Kok cabinet, the Christian Democrats (CDA), the LPF and the Liberals in the first Balkenende cabinet, and the Christian Democrats, the Liberals and D66 in the second Balkenende cabinet. The involvement of these higher-level players makes the transposition of the laying hens directive an example of multi-player coordination as distinguished in the theoretical model.

The domestic players were divided regarding the level of protection of laying hens. On the one hand, the departments within the Ministry of Agriculture as well as Minister Brinkhorst agreed to ban battery cage systems. In the coalition agreement of August 1998, the government already announced that it preferred to ban battery cages, most preferably in the context of the EU. However, if agreement at the EU level were not feasible, the cabinet was prepared to take unilateral measures to ban these systems in The Netherlands (Dutch Parliament, 1998: 59). Based on the possibilities offered by the directive, the departmental actors as well as the minister thus preferred a high level of protection by banning all battery cage systems, including 'enriched' cages as mentioned in the directive. This position was supported by the Labour Party and D66. The Greens and the Socialist Party, which were part of the opposition, also preferred a ban.

On the other hand, the Liberal Party did not support a ban of 'enriched' battery cage systems. According to this party's position, the minister had not transposed the directive correctly. Furthermore, by setting higher standards

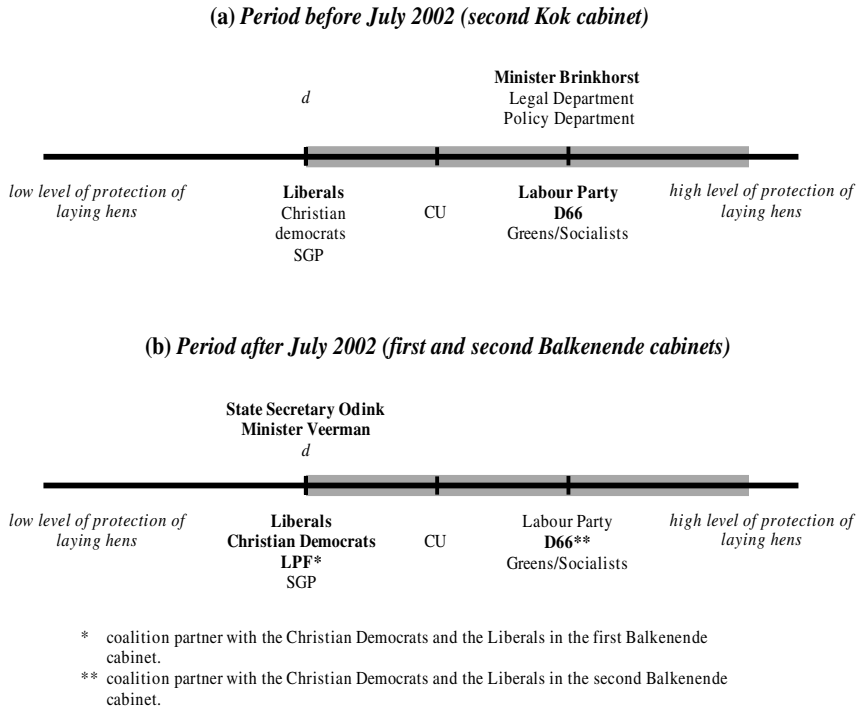


Figure 8 Preferences of the domestic players on the laying hens directive.

Notes: SGP (Reformed Protestant Party) and CU (Christian Union) are both small Christian parties. Because the directive defines a minimum level of protection, the contents of the directive d are in this case equivalent to \underline{d} . A maximum sustainable policy, \bar{d} , is left open.

than demanded by the directive, the proposed rules would damage the laying hens sector by increasing competition from farmers in other European countries (Dutch Parliament, 2002: 3). This position was also supported by the Christian Democrats, the LPF and the SGP (the Reformed Protestant Party, one of the smaller Christian parties). The responsible cabinet members – State Secretary Odink (LPF) and Minister Veerman (CDA), respectively – favoured a literal transposition of the directive without setting higher standards. In their view, the laying hens sector had to decide whether it wanted to keep ‘enriched’ battery cages or use alternative free-range systems. The preferences of the main actors are illustrated in Figure 8.

With regard to the alternative systems, the directive laid down only minimum conditions in terms of housing, food, water and care of hens, frequently using words such as ‘at least’ in describing these conditions. Providing a minimum level of protection, the set of sustainable policies is thus asymmetric, as indicated by the grey area in Figure 8: although lower standards are

not allowed, member states can introduce higher levels of protection. The cocoa and chocolate products directive, in contrast, provided a strict regulatory framework from which member states were not allowed to deviate.

A set of sustainable proposals allowing the introduction of higher standards and the opposing preferences of the governing parties in the second Kok and the second Balkenende cabinets correspond to the situation described by Hypothesis 3.⁷ Since the directive is still located in the interval between the ideal positions of these higher-level players (although at the lower bound), they are expected to adopt a literal interpretation. In addition, because the players are in a situation of deadlock, the transposition process is expected to be delayed (Hypothesis 4).

The prediction of Hypothesis 3 – literal transposition – is supported by the empirical outcome because parliament accepted the new decree, which includes the option of ‘enriched’ battery cages. With the support of the LPF, Minister Veerman passed the bill to implement the decree through parliament. In a crucial vote on an amendment to ban ‘enriched’ cage batteries, the Christian Democrats, the Liberals and the LPF voted against, whereas the amendment was supported by D66 and the Labour Party.

Furthermore, as predicted by Hypothesis 4, transposition was substantially delayed in this case: The Netherlands did not transpose the directive until more than two years after the deadline. This delay was mainly shaped by the divide between the Christian Democrats, the LPF and the Liberals on the one hand and the Labour Party and D66 on the other. This twice led to an initiative to discuss the decree on laying hens in parliament: the Liberals and the Christian Democrats, together with the SGP, required the first decree to be discussed in parliament; the Labour Party wanted parliament to consider the second decree. Two initiatives on the same issue are unusual and substantially delayed the transposition process. In addition, preparing a government decree takes time owing to administrative consultations, including the obligatory advice of the State Council. That the State Secretary as well as the Minister in the Balkenende cabinet decided to introduce a new decree further slowed down the process. In this respect, the elections and the subsequent government reshuffle hardly affected delay. If all relevant players had preferred the first decree, the directive would have been transposed in November 2001, thus meeting the deadline.

Conclusions

The goal of this paper is to show how domestic actors interact to shape transposition. A first finding is that single-player coordination is better capable of adapting a directive to domestic preferences than is multi-player coordination.

Multi-player coordination is defined as a mechanism in which two or more higher-level players decide on how a directive will be handled. Differences in view between these higher-level players lead to political deadlock, that is, a situation in which opposing interests do not permit any other decision than a literal transposition of the directive (see also Dimitrova and Steunenberg, 2000: 214–18). This situation is illustrated by the cumbersome transposition of the laying hens directive, which took almost five years to be implemented, thus delaying implementation for more than two years past the official deadline.

Single-player coordination does not suffer from the drawback of deadlock and provides more opportunities for a non-literal transposition, which allows domestic players to adapt the directive to their preferences. The dynamics of single-player coordination are illustrated by the cocoa and chocolate products directive. The Minister of Health had the lead in this process, which was concluded in less than two years and more than one year ahead of the official deadline. There was no delay despite the fact that some domestic actors in The Netherlands – and especially the Ministry of Foreign Affairs – were very much against this directive. Furthermore, the directive was transposed in a non-literal way, satisfying a stricter level of regulation, which was preferred by the higher-level player.

Both coordination mechanisms allow lower-level players to draft an implementing policy, which provides these players with discretion. The analysis shows that the degree of discretion available to the lower-level players is a result of the existence of sustainable policies that will be approved by the higher-level players. Moreover, it also depends on whether all lower-level players prefer certain policies. If sustainable policies are limited, or one of the higher-level players prefers a policy close to the one specified in the directive, lower-level players' leeway will be limited. This indicates that the degree of discretion lower-level players have is not equal to the degree of discretion provided by the directive (that is, the range of sustainable policies). Lower-level discretion is thus further shaped by national coordination mechanisms.

The empirical analysis in this paper also illustrates that, depending on the case, different domestic actors need to be regarded as relevant players. In this paper an actor is considered as a player if he or she, formally or informally, has authority to decide on a policy. Players then have *de facto* power. In the case of the laying hens directive, the relevant players included the Minister of Agriculture, departments within the ministry and the main political parties in parliament. This corresponds with some claims that national political parties – sometimes taken as national legislative veto players – play an important role in transposition (see, for instance, Treib, 2003; Mbaye, 2001; Giuliani, 2003). However, most directives do not require the introduction of a statutory law or parliamentary approval based on the conditional

delegation of policy-making power. In the case of the chocolate and cocoa products directive, the required changes could be unconditionally introduced by government decree. In this case, the relevant players are administrative actors, including some departments from other ministries, and not national political parties.

The mechanisms of single-player and multi-player coordination are thus linked to the extent to which the transposition of a directive requires changes in the existing national legal system. If the contents of a directive require the adoption of only one or more 'lower-level' instruments (such as ministerial orders or government decrees), transposition could take place within the framework of single-player coordination. A minister in political systems with a weak core executive, or the prime minister in other systems, could resolve potential conflict between lower-level players. Problems of deadlock and delay may not arise. However, if a directive requires the introduction of new law, multi-player coordination seems to be inevitable, especially if the government is based on a coalition. Consequently, deadlock and delay are possible.

The findings in this paper resemble the approach that understands delay as the result of 'misfit' between EU and domestic policy (Héritier, 1996; Risse et al., 2001: 6–9). In contrast to this approach, however, the analysis in this paper suggests that delays resulting from a 'misfit' in terms of opposing preferences disappear when players' preferences change. There are several ways of producing preference changes and thus resolving the problem of deadlock. One way is extensive deliberation between these players, which may change preferences. Another possibility is issue linkage, which increases the possibilities of exchange among domestic actors and could lead to mutually preferred solutions. At the same time, issue linkage may also complicate transposition (Falkner et al., 2004: 465–6). A third option is to redefine the relevant players in the decision-making process, which could, for instance, be done by moving a dossier to another group of actors (for example by involving an advisory committee). The last possibility is to postpone discussion until some major political changes take place, such as new elections.

In a more general way, the paper shows that European policy-making, to the extent that it concerns directives, does not end at the last stage of the legislative process in the Council of Ministers. After adoption, directives are further shaped by the member states when they are put into national rules. In this process, and within the limits of Commission oversight, domestic actors can adopt an interpretation that somewhat deviates from the directive. In this way, EU policy-making is best described as a long chain of mutually dependent decisions that cuts across multiple levels of government. Despite this complexity, the current literature on the EU tends to emphasize the EU legislative stage in which policy is shaped by the interactions between the

Council of Ministers and the European Parliament. However, from a policy perspective, such a view is insufficient and does not show how the ambitions formulated in Brussels are transformed and implemented in the national and sometimes regional and local administrations of the member states. The approach proposed in this paper can help to disentangle and clarify these complex processes and their outcomes.

Notes

I thank the interviewed government officials for their willingness to participate in the research project on which this paper is based. An earlier version of this paper was presented as a Jean Monnet Lecture at the Free University of Berlin and at the 33rd Joint Sessions of ECPR, 14–19 April 2005, in Granada, Spain. I appreciate the helpful comments of the participants. Furthermore, I am grateful to Antoaneta Dimitrova, Karen Anderson and the anonymous referees of this journal for their suggestions.

- 1 The obligation to comply is found in Articles 10 and 249 EC. Based on EU case law, directives take precedence over national law, they are binding as to the result to be achieved in the member states, and they take direct effect if the provisions are unconditional and sufficiently precise (Kapteyn and Verloren van Themaat, 1998: 326–31, 535–7). Moreover, national governments are, in some circumstances, liable for the damage to private parties resulting from late or improper transposition of directives (Kapteyn and Verloren van Themaat, 1998: 564–9).
- 2 See the various Commission scoreboards on internal market directives at http://europa.eu.int/comm/internal_market/score/index_en.htm, which includes the internal market directives in force, or the overview by the Secretariat General of the European Commission at http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm#transpositions, which contains all directives including those that are no longer in force. Based on the latter source, the average backlog was 2.3% on 10 January 2005, and 20 of the 25 member states did not comply with the Stockholm target.
- 3 In this way, it is possible to specify the key factors that, according to Ganghof (2003), are the main issues in empirical veto player studies. See Bueno de Mesquita and Stokman (1994), Stokman and Thomson (2004), Selck and Steunenberg (2004), Thomson et al. (2006) for other empirical studies using expert opinions in handling these issues.
- 4 The Commission uses various instruments to challenge member states and impose compliance. On the one hand, the Commission can start an infringement procedure and bring a case to the European Court of Justice. The Commission needs to defend its claim that a member state deviated from EU law, and a member state may challenge the Commission's judgement. On the other hand, the Commission often uses 'soft' enforcement mechanisms such as inspections, reviews and auditing protocols. In combination with 'naming and shaming', these mechanisms can be rather effective in limiting the range

- of policy alternatives to member states. See Börzel (2003) for a further discussion of the Commission's compliance strategies.
- 5 See the Appendix for the special case of a single lower-level player. The Appendix is not included in the printed version of this paper and can be found on the EUP website at <http://www.uni-konstanz.de/eup/issues.htm> or at <http://steunenberg.bestuurskundeleiden.nl>.
 - 6 Interestingly, the Directorate-General for International Cooperation of the Ministry of Foreign Affairs, which is responsible for development aid, played a prominent role in shaping the Dutch position in the Union's legislative process. The ministry strongly opposed the idea of allowing other vegetable fats than cocoa in the production of chocolate to protect cocoa farmers in developing countries. However, when it came to transposition, this ministry was no longer interested in the directive and, according to several government officials, did not play a role in discussions.
 - 7 I disregard the decision-making under the first Balkenende cabinet because this cabinet's period of government was too short to decide on the laying hens directive.

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